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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

AMY GOLDMAN, Plaintiff and Respondent, v. EDWARD HOLL et al., Defendants and Appellants.	A151832 (San Francisco County Super. Ct. No. CGC-16-551663)

Defendants appeal from an order denying their motion to compel arbitration (Code Civ. Proc., §§ 1281.2, 1294.2).[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2013, Edward Holl was affiliated with several companies, including MP Maritime LLC (Maritime). He urged Amy Goldman to invest in one of his companies; he promised the investment would generate returns " 'exceed[ing] 20% annually.' " In two transactions in late 2013, Goldman purchased 22,200 units of Maritime for $222,000. The Millennium Trust Company (Millennium Trust) served as the custodian of some of the funds Goldman invested in Maritime. Goldman signed two purchase agreements for the transactions. The purchase agreements provided "the Investor agrees to purchase and the Company agrees to sell . . . Class A Units of the Company . . . having the rights,

[1] Statutory references are to the Code of Civil Procedure. Defendants are Edward Holl, Carlo Holl, MP Maritime LLC, Merchant Partners LLC, MP Maritime Analytics Corporation, and MP Seatrade LP. We recite only those facts necessary to resolve the issues on appeal.

preferences, privileges and restrictions set forth herein and in the Operating Agreement of the Company." The purchase agreements also stated the "representations and warranties of the Members set forth in the Operating Agreement are hereby incorporated by reference . . . and the Investor hereby restates such representations and warranties in this Agreement for the benefit of the Company."

The purchase agreements did not attach the operating agreement. When she signed the purchase agreements, Goldman was unaware the operating agreement existed. In May 2014, Goldman asked Holl to return her money. Holl promised to do so, but "no funds were returned." In 2015, Holl provided Goldman with the 22-page operating agreement. The agreement is dated 2012 and it is signed only by Holl. Holl later produced documentation showing most of Goldman's money was lost shortly after she invested it.

Litigation Against Defendants

In April 2016, Goldman filed a complaint against defendants alleging 11 causes of action, including fraud and breach of fiduciary duty. Defendants answered the complaint. The answer did not refer to an arbitration provision or assert the right to arbitration as an affirmative defense. In September 2016, defendants filed a case management conference statement requesting a jury trial and stating their intention to file a summary judgment motion. Defendants did not check the box on the case management form regarding arbitration; they claimed the matter was "exempt from judicial arbitration." That same month, the parties attended a case management conference, where the trial court set a June 2017 trial date.

In late 2016, Goldman propounded written discovery. Defendants responded and—after "extensive meet-and-confer efforts"—produced 700 pages of documents, which Goldman's attorney "spent significant time analyzing" in preparation for trial. Goldman noticed Holl's deposition for January 2017. In response, defense counsel said he was withdrawing and asked to continue Holl's deposition until defendants hired a new attorney. Goldman's attorney rescheduled the deposition. In February 2017, the court granted defense counsel's motion to withdraw.

Motions to Compel Arbitration and Continue Trial

In April 2017, defendants' current attorney substituted as counsel and asked Goldman to submit to arbitration. She refused. Defendants moved to compel arbitration. They argued (1) Goldman became a "member" of Maritime when she signed the purchase agreements; (2) the purchase agreements incorporated the operating agreement, which governs the rights and obligations of Maritime's members; (3) the operating agreement contains an arbitration clause; (4) under Delaware law, Goldman was bound by the operating agreement even though she did not sign it;[2] and (5) Goldman's causes of action arose out of her decision to invest in, and become a member of, Maritime.

The motion attached the operating agreement, which contains the following paragraph under the "Miscellaneous" heading: "16.9 Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, will be settled by arbitration in . . . Delaware or . . . New York in accordance with the rules then obtaining, of the American Arbitration Association [(AAA)] regarding commercial arbitration. Judgment upon the award rendered may be entered into any court having jurisdiction thereof. The losing party will bear the costs and expenses of such arbitration." According to defendants, Goldman agreed to submit issues regarding the scope and enforceability of the arbitration provision to the arbitrator.

Defendants argued they did not waive their right to compel arbitration. They noted they had "not initiated any discovery," had "not sought court rulings on any issues except the present issue of arbitration," and that their participation in the litigation had "been limited to responding to [Goldman's] requests for written discovery and having their counsel prepare an answer, and attend case management conferences." In his declaration, Holl averred he was requesting arbitration "because the expenses of litigation and discovery demands that [Goldman] has made . . . make this case unaffordable for me to defend." In his declaration, defense counsel stated he noticed an arbitration provision

[2] Defendants acknowledged Goldman had not signed the operating agreement. They claimed that Holl provided the Millennium Trust with the operating agreement before Goldman invested in Maritime.

in the operating agreement when he was formally retained by defendants in April 2017. The declaration attached the AAA rules in effect in 2016.

In May 2017, defendants moved to continue the trial date. Goldman opposed the motion, claiming she would be substantially prejudiced by a continuance. She argued defendants "made a strategic choice to wait until the trial date and then attempt to postpone the trial by filing a motion to compel arbitration. [¶] Defendants could have asked for arbitration a year ago but chose not to because [they] knew that it had a slim chance of prevailing." In June, the court granted the motion to continue and continued trial.

Opposition and Order Denying Motion to Compel Arbitration

Goldman opposed the motion to compel arbitration, claiming she did not consent to arbitration because she did not receive or sign the operating agreement and "was not even aware of the existence of the arbitration clause." Goldman also argued defendants waived their right to arbitrate. Defendants reiterated their arguments in a reply, and the court held a hearing on the motion.

In a written order, the court denied the motion, concluding defendants failed to establish the existence of a valid arbitration agreement. The court rejected defendants' contention that Goldman was bound by the operating agreement. It noted the purchase agreements did not attach the operating agreement and did "not clearly and unequivocally reference the arbitration language" of that agreement. According to the court, the purchase agreement's reference to the rights and warranties of the operating agreement did not refer to the arbitration provision. The court explained: "in common parlance, the rights and privileges of owning a unit include voting and receipt of dividends, . . . priority vis-à-vis other units, and restrictions include limitations on sale. None of those terms bring to mind resolution of disputes by arbitration. Similarly, the terms representations and warranties include factual statements, but do not cover resolution of disputes by arbitration."

The court also determined the operating agreement was not known to Goldman, nor " 'easily available' " to her, when she signed the purchase agreements. As the court

explained, there was no evidence Goldman "knew that the Operating Agreement had been sent to [Millennium] Trust. More importantly, the sole role of [Millennium] Trust in the purchase transactions was as a custodian of . . . Goldman's IRA. There is no evidence that [Millennium] Trust assumed any role with regard to advising . . . Goldman about the Purchase Agreements or the Operating Agreement, much less any role regarding dispute resolution or arbitration language."

Finally, the court determined defendants waived their right to arbitrate "even if the arbitration language of the Operating Agreement was incorporated into the Purchase Agreement." It noted defendants answered the complaint, filed a case management statement requesting a jury trial, and did not move to compel arbitration until April 2017. According to the court, "[t]hese circumstances warrant a finding of waiver, especially given the undisputed fact that . . . Goldman and her counsel had no knowledge that defendants contended that the arbitration language of the Operating Agreement was incorporated into the Purchase Agreements or that defendants intended to seek to compel arbitration until April 2017. . . . [D]efendants' decision to seek arbitration was made by their new counsel . . . . New counsel's determination that their clients have a right to arbitrate after the clients had never claimed such a right until shortly before a jury trial is not a satisfactory excuse for [their] unreasonable delay in seeking arbitration. . . . Goldman suffered substantial prejudice by defendants' unwarranted delay in seeking arbitration because she was required to prepare for a jury trial, which involves different rules and different methods of preparation than an arbitration."

DISCUSSION

" '[T]he threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate.' " (*Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396, italics omitted.) Defendants have the burden of proving the existence of an agreement to arbitrate. (*Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 890.) Goldman has the burden of establishing a defense to enforcement, such as waiver. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195

(*St. Agnes*).) We review the court's determination that there was no valid arbitration agreement de novo. (*Aanderud*, at p. 890.) We review for substantial evidence the court's conclusion that defendants waived any assumed right to arbitrate. (*St. Agnes*, at p. 1196.)

I.

Defendants Forfeited Their Arguments Regarding the Applicability of Delaware Law

Defendants claim the court erred by denying the motion to compel arbitration because the operating agreement is governed by Delaware law and, under Delaware law, the arbitrator determines the existence of an arbitration agreement. We reject this argument because it was raised for the first time on appeal. (*Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 51.) The motion did not raise a choice of law argument, nor cite any Delaware cases. Instead, it relied on California law. The motion's superficial references to Delaware law have not preserved this argument for appellate review.

We conclude the court properly applied California law (see *Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1188) and decided the gateway issue of whether the parties had a valid arbitration agreement.[3] (*Green Tree Financial Corp. v. Bazzle* (2003)

[3] Our conclusion that California law applies is fatal to defendants' claim that under Delaware law, Goldman was bound by the operating agreement "regardless of whether [she] had read or signed" it. The undisputed evidence establishes Goldman did not know of the existence of the operating agreement until after she demanded the return of her investment. Under California law, "a party to a contract cannot be held to the contract's arbitration provision where the plaintiff does not know a contract exists." (*Knutson v. Sirius XM Radio Inc.* (9th Cir. 2014) 771 F.3d 559, 568.)

For the first time at oral argument, defendants referred to various sections of the Corporations Code, claiming these provisions support the conclusion that Goldman's status as a "member" of Maritime bound her to the arbitration clause in the operating agreement. We reject this contention, made for the first time at oral argument. (*City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1318.) We reject defendants' reliance on *Smythe v. Uber Technologies, Inc.* (2018) 24 Cal.App.5th 327 for the same reason. *Smythe* was decided before defendants filed their reply brief. Defendants have offered no justification for failing to cite the case in their reply brief,

539 U.S. 444, 452; *Schein, Inc. v. Archer & White Sales, Inc.* (2019) 586 U.S. __ does not alter our conclusion. In that case, the United States Supreme Court held the Federal Arbitration Act "does not contain a 'wholly groundless' exception" and that "[w]hen the parties' contract delegates the arbitrability question to the arbitrator, the courts must respect the parties' decision as embodied in the contract." (*Schein*, at p. 2.) The court however, "express[ed] no view" on whether the contract "in fact delegated the arbitrability question to an arbitrator." (*Schein*, at p. 8.) The "wholly groundless" exception is not at issue here. We conclude the operating agreement did not delegate the arbitrability issue to the arbitrator by clear and unmistakable evidence. (See *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 790–792 [reference to AAA rules in arbitration provision was not "*clear and unmistakable evidence*" the parties intended to submit enforceability issue to the arbitrator].)

II.

Defendants Did Not Establish the Existence of an Arbitration Agreement

The purchase agreements do not contain an arbitration clause, but defendants nevertheless claim Goldman is bound by the arbitration provision in the operating agreement. "[A]n agreement need not *expressly* provide for arbitration, but may do so in a secondary document which is incorporated by reference . . . ." (*Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 639.) " ' "For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." ' [Citations.] [¶] The contract need not recite that it 'incorporates' another document, so long as it 'guide[s] the reader to the incorporated document.' " (*Shaw v. Regents of University of California*, *supra*, 58 Cal.App.4th at p. 54.)

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and they did not file a notice of new authority pursuant to California Rules of Court, rule 8.254.

We conclude the purchase agreements do not clearly and unequivocally incorporate the arbitration clause. The purchase agreements state Goldman agreed to purchase units of Maritime "having the rights, preferences, privileges and restrictions set forth . . . in the Operating Agreement." This amorphous reference to the operating agreement does not call Goldman's attention to the import of that document—i.e., that it contained an arbitration clause. Defendants make no persuasive effort to explain how the terms "rights, preferences, privileges and restrictions" signal the presence of an arbitration clause. The same is true with respect to the statement that the "representations and warranties of the Members set forth in the Operating Agreement are hereby incorporated by reference." Defendants have not directed our attention to a "representations and warranties" section of the operating agreement and we fail to discern how an arbitration provision, in the "Miscellaneous" section near the end of a 22-page document, constitutes a representation or a warranty.

In addition to the reference being clear and unequivocal, "the terms of the incorporated document [must] be known or easily available to the party to be bound." (*Chan v. Drexel Burnham Lambert, Inc., supra,* 178 Cal.App.3d at p. 644.) Here, Goldman obviously did not know of the terms of the operating agreement, because she was unaware the document existed until 2015, well after she signed the purchase agreements and demanded the return of her investment. Nor was the operating agreement "easily available" to Goldman. Defendants' argument to the contrary—that the document was available to Goldman because she obtained it before filing the complaint—borders on the ridiculous. That Millennium Trust received a copy of the operating agreement in 2012—signed only by Holl—does not establish the operating agreement was easily available to Goldman.

Defendants' reliance on *Wolschlager v. Fidelity National Title Ins. Co.* (2003) 111 Cal.App.4th 784 does not alter our conclusion. In *Wolschlager*, the plaintiff solicited a preliminary title report for the purpose of obtaining title insurance. The insurance policy contained an arbitration clause, but the title report did not. (*Id.* at p. 787.) The appellate court determined the arbitration clause was sufficiently incorporated into the

title report by reference because the title report specifically stated the insurance policy " 'should be read,' " identified the form the policy would take, and directed the reader to where the policy could be found. (*Id.* at pp. 787, 791.) *Wolschlager* is distinguishable. Here, the purchase agreements did not direct Goldman to read the operating agreement or describe the operating agreement, nor direct Goldman where to find that agreement.

We conclude the arbitration provision in the operating agreement was not effectively incorporated into purchase agreements. As a result, defendants did not prove the existence of a valid agreement to arbitrate their dispute with Goldman, and the court properly denied the motion to compel arbitration.

III.

Defendants Waived Any Assumed Right to Arbitrate

Defendants challenge the court's finding that they waived any assumed right to arbitrate. When determining waiver, the trial court considers whether (1) the party's actions are inconsistent with the right to arbitrate; (2) the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) intervening steps—e.g., taking advantage of judicial discovery procedures not available in arbitration—had taken place; and (5) the delay affected, misled, or prejudiced the opposing party. (*St. Agnes, supra,* 31 Cal.4th at p. 1196.)[4] "[W]aiver is not to be lightly inferred and the party seeking to establish it bears a 'heavy burden of proof,' with all doubts resolved in favor of arbitration. . . . ' "It was the trial court's duty to determine whether" the petitioners met their "burden of proof; it is our duty to determine whether there is substantial evidence to support the trial court's findings that it did." ' " (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 945–946.)

[4] Defendants suggest the arbitrator, not the trial court, should have determined the waiver issue. We disagree. (*Hong v. CJ CGV America Holdings, Inc.* (2013) 222 Cal.App.4th 240, 255–258 [waiver defense decided by court, not arbitrator]; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 982 [courts decide waiver].)

Substantial evidence supports the court's waiver finding. Viewed as a whole, defendants' actions were inconsistent with the right to arbitrate—their answer to the complaint made no reference to arbitration and their case management conference demanded a jury trial, indicated an intention to move for summary judgment, and claimed the matter was exempt from arbitration. (*Burton v. Cruise*, *supra*, 190 Cal.App.4th at p. 943 [upholding trial court's waiver determination where plaintiff's case management statement requested jury trial and plaintiff failed to check the box regarding binding arbitration].) In addition, the litigation machinery had been substantially invoked when defendants notified Goldman of their intent to arbitrate. Defendants requested arbitration a year after the complaint was filed, and only two months before the original trial date, after Goldman had propounded discovery, noticed Holl's deposition, engaged in "extensive meet-and-confer efforts," and analyzed the documents defendants produced. (See *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558–559 [defendants waived right to arbitrate where they failed to plead arbitration as an affirmative defense, delayed several months in seeking arbitration, and responded to plaintiff's discovery requests, "never once suggesting that discovery should be barred because this dispute had to be arbitrated"].)

In their motion to compel arbitration, defendants offered no compelling explanation for the delay. (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992.) That defendants obtained new counsel does not justify the delay in seeking arbitration. Finally, defendants' conduct prejudiced Goldman. (*Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1366–1367.) Defendants' conduct substantially undermined the important public policy favoring arbitration as a speedy and relatively inexpensive means of dispute resolution, and substantially impaired Goldman's ability to take advantage of the benefits and efficiencies of arbitration. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1204.) "[W]e conclude substantial evidence supports the trial court's finding that defendants waived the right to diligently compel arbitration, even assuming that defendants had such a right." (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 217.)

DISPOSITION

The order denying the motion to compel arbitration is affirmed. Goldman is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.

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